these optional arrangements."[26] Qwest stated that it considered the first 20 miles of Type 1 facilities to be local interconnection facilities and thus would charge paging carriers only for the transiting traffic associated with those facilities whether or not it obtained optional toll suppression arrangements.[27]

Mountain elected to retain a Type 1[28] facilities arrangement whereby it obtains DID numbers separately in Walsenburg, Pueblo, and Colorado Springs, with dedicated toll facilities, obtained from Qwest, connecting these numbers to Mountain's single POC in Pueblo. As noted above, this arrangement permits a Qwest end user located in the same local service area with a Mountain subscriber to dial a local number to reach that subscriber without incurring toll charges. Mountain did not choose the option of obtaining free interconnection facilities for all calls placed by Qwest customers within a MTA – an option under which Qwest would have assessed toll charges on its end-users located outside of Pueblo for calls placed to Mountain subscribers. Under the arrangement favored by Mountain, then, Qwest lost some toll revenues it otherwise would have collected and Mountain received the advantage of having calls to its customers unburdened by toll charges that might have discouraged usage and thus might have made its paging service less attractive.

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[26] Qwest July 2000 Letter at 3 (J.A.).

[27] Qwest July 2000 Letter at 2 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

[28] Type 1 and Type 2 interconnections are forms of interconnection that LECs offer to CMRS carriers. Under Type 1 interconnection, the LEC owns the switch serving the wireless network, whereas under Type 2 interconnection the wireless carrier owns the switch. See Petitions of Sprint PCS and AT&T Corp., 17 FCC Rcd 13192, 13197 n.36 (2002), petition for review filed, AT&T Corp. v. FCC, D.C. Circuit No. 02-1221 (filed July 9, 2002).

II. Administrative Proceedings

A. Mountain's Complaint and Responsive Pleadings

On September 12, 2000, Mountain filed a formal complaint against Qwest. Complaint (J.A.). Mountain claimed inter alia that Qwest had violated sections 51.703(b) and 51.709(b) of the Commission's rules by levying charges for the delivery of calls to Mountain's system. Complaint at 9-10 (¶¶ 36-40) (J.A.).[29] Mountain argued that Qwest was responsible not only for the costs associated with terminating traffic that originated on Qwest's own facilities, but also for the costs associated with transiting traffic that originated on the networks of other carriers. Complaint at 11 (¶ 44) (J.A.).

In an Answer filed on October 2, 2000, Qwest denied that it charges "paging carriers for the portion of local interconnection facilities used to deliver traffic that originates on Qwest's network." Answer (October 2, 2000) at ii (J.A.). Qwest asserted that it "bills Mountain only for that portion of the Type 1 paging facilities used to deliver so-called 'transiting traffic,' that is, traffic not originated on Qwest's local network."[30] Qwest asserted that the Commission in TSR Wireless had ruled that LECs may assess charges for transiting traffic, and it argued that Mountain could not collaterally attack TSR Wireless in this complaint proceeding. Answer at 10-11, 21, 24 (J.A.).

Qwest denied Mountain's claim that it recovers the costs of delivering transit traffic from other sources. Qwest stated that the costs of the dedicated facilities at issue in this case "are not

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[29] Even though Mountain filed its complaint against Qwest, it charged unlawful conduct by U S West Communications, a company that subsequently merged with Qwest and "currently operates as Qwest." Complaint at 1 (J.A.). The references to Qwest in this brief include U S West, where appropriate.

[30] Answer, Exh. 1 (Decl. of Vickie Boone) at 3 (J.A.).

recovered in any switched charge" or in any other form.[31] Although Qwest acknowledged that it "assesses charges on the originating carrier for transporting and switching traffic that originates on that carrier's network," it claimed that "those charges do not encompass the dedicated facilities connecting Qwest's network and a paging provider's network."[32]

Qwest rejected Mountain's claim that Qwest is the originating party for all traffic that is terminated on Mountain's network. Qwest asserted that the Commission in TSR Wireless had made clear that the originating LEC is the LEC whose customer places the call, not the LEC that delivers the traffic to the paging company. Answer at 21-22 (J.A.). Qwest reiterated that TSR Wireless expressly permits a LEC to charge a paging company for the delivery of traffic that originates on another LEC's facilities. Answer at 21-22 (J.A.).

Qwest also asserted that TSR Wireless permits a LEC to charge a paging carrier for wide-area and similar calling arrangements that allow the paging carrier to offer customers a paging number in a local calling area in which the paging carrier has no point of contact. According to Qwest, such calling arrangements, which enable Qwest customers in an extended calling area to call paging customers without incurring toll charges that Qwest otherwise would collect, "'are not necessary for interconnection' and thus need not be provided at all, much less for free." Answer at 11, quoting TSR Wireless, 15 FCC Rcd at 11184 (¶ 30) (J.A.). Qwest emphasized that Mountain has the option of receiving traffic throughout its MTA at no charge, provided that

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[31] Answer at 10-11 (J.A.). See id. Declaration of Vickie Boone at 3 ("Qwest only recovers the costs of [facilities used for transiting traffic] from Mountain and does not receive any compensation for them from originating carriers").

[32] Answer Exh. 3 (Declaration of Sheryl R. Fraser) at 2 (J.A.).

the arrangement allows Qwest to collect applicable toll charges from its own end users. Answer at 11-12 (J.A.).

As an affirmative defense, Qwest claimed inter alia that Mountain had not shown that it had been injured by Qwest's alleged violations. Answer at 35-36 (J.A.). Qwest pointed out that Mountain had not paid Qwest "anything for any paging facilities that it has purchased since February 1998, including the transiting charges upheld in TSR Wireless." Answer at iii, 36 (J.A.). According to Qwest, Mountain owed an outstanding balance of more than $21,000 (including late payment charges) attributable to charges permitted by TSR Wireless.[33]

B. Staff Order

On February 4, 2002, the Commission's staff, on delegated authority, denied Mountain's complaint. Staff Order, 17 FCC Rcd 2091 (J.A.). The staff found first that sections 51.703(b) and 51.709(b) of the Commission's rules do not bar the LECs from charging paging carriers for transiting traffic. 17 FCC Rcd at 2094-95 (¶¶ 7-10) (J.A.). The staff pointed out that the Commission in TSR Wireless[34] and the subsequent Texcom Order[35] had construed those rules to allow a LEC to charge paging carriers for the transport of transiting traffic. Staff Order, 17 FCC Rcd at 2094-95 (¶¶ 8-10) (J.A.).

The staff also upheld the lawfulness of Qwest's charges for the dedicated toll facilities that connect Mountain's DID numbers in Colorado Springs and Walsenburg to Mountain's sole POC in Pueblo. 17 FCC Rcd at 2096-97 (¶¶ 11-13) (J.A.). The staff determined that Qwest's

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[33] Answer, Exh. 1 (Declaration of Vicki Boone) at 4 (J.A.).

[34] TSR Wireless, 15 FCC Rcd at 11177 n.70.

[35] Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Cor., d/b/a/ Verizon Communications, 16 FCC Rcd 21493, 21494 (¶ 4) (2001) ("Texcom Order "), recon. denied, 17 FCC Rcd 6275 (2002) ("Texcom Reconsideration").

provision of dedicated toll facilities that enable Mountain to offer its subscribers a local number in several local calling areas is "an optional service that is not necessary for interconnection." 17 FCC Rcd at 2097 (¶ 13) (J.A.). The staff reasoned that Qwest would have assessed toll charges on its end users located outside the Pueblo local calling area for calls to Mountain's subscribers if Mountain had not obtained this arrangement. The staff thus concluded that Mountain, in effect, had entered into a wide area calling arrangement with Qwest, and relying on TSR Wireless, the staff held that Qwest is entitled to charge Mountain for that arrangement. 17 FCC Rcd at 2097 (¶ 13) (J.A.).

C. Commission Order.

Mountain petitioned the Commission to review the Staff Order.[36] The Commission on July 25, 2002, denied Mountain's petition. Order, 17 FCC Rcd 15135 (J.A.).

The Commission affirmed that Qwest may charge Mountain for the cost of facilities used to transport transiting traffic, finding that the staff properly had determined that TSR Wireless permits LECs to assess charges on paging carriers for transiting traffic. Order, 17 FCC Rcd at 15136-37 (¶¶ 2-3) & n.8 (J.A.). The Commission also found that Mountain had not provided support for its claim that Qwest recovers the costs of these facilities from another source. 17 FCC Rcd at 15136-37 (¶¶ 2-3) (J.A.). The Commission noted that Qwest is not a terminating carrier for the transiting traffic it sends to Mountain and thus is unable to recover reciprocal compensation payments for such traffic. 17 FCC Rcd at 15137 (¶ 3) (J.A.).

The Commission also rejected Mountain's challenge to Qwest's charges for the dedicated toll facilities that connect the DID numbers in Colorado Springs and Walsenburg to Mountain's

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[36] Petition for Reconsideration filed by Mountain (March 5, 2002) (J.A.).

interconnection point in Pueblo. 17 FCC Rcd at 15137-39 (¶¶ 4-7) (J.A.). The Commission agreed with its staff that Qwest lawfully can charge Mountain for this type of arrangement because it is a form of wide area calling within the meaning of TSR Wireless. By procuring DID numbers in Walsenburg, Pueblo, and Colorado Springs, and obtaining dedicated lines from Qwest to connect these DID numbers to its POC in Pueblo, "Mountain ensures that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to [Qwest's end-user customers] in those areas." 17 FCC Rcd at 15135 (¶ 5) (J.A.). Mountain's facilities configuration in effect "prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain's network" 17 FCC Rcd at 15138 (¶ 5) (J.A.).[37]

Although the Commission acknowledged the similarity of the network configuration at issue in TSR Wireless to Mountain's arrangement with Qwest, the Commission rejected Mountain's claim that TSR Wireless barred Qwest from charging Mountain for the dedicated toll facilities at issue in this case. 17 FCC Rcd at 15138-39 (¶ 6) (J.A.). The Commission pointed out that TSR Wireless permitted a LEC to charge a CMRS carrier for wide area calling service arrangements that are not necessary to effectuate interconnection. 17 FCC Rcd at 15139 (¶ 6) (J.A.). The Commission explained that Mountain was free to reorder its DID numbers and cancel the dedicated toll facilities connecting those numbers to its single POC, and instead permit Qwest to bill its own end users for toll calls. Mountain's choice not to pursue that

[37] The Commission rejected Mountain's claim that the lack of a written agreement shows that Mountain and Qwest did not enter into a wide area calling arrangement: "Mountain's ordering and acceptance of the T-1 facilities from a tariff that create[s] a wide area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service." 17 FCC Rcd at 15135 (¶ 5) (J.A.).

alternative and to maintain an arrangement that "prevents Qwest from charging its customers for what would ordinarily be toll calls" meant that the challenged charges were lawful. 17 FCC Rcd at 15139 (¶ 6) (J.A.).[38]

SUMMARY OF ARGUMENT

1. The Commission reasonably applied its own regulations in determining that the facilities charges at issue in this case were lawful charges for facilities used in providing wide area calling or equivalent services. TSR Wireless describes wide area calling or equivalent services as optional services with a toll suppression function. The Commission reasonably held that Mountain's facilities arrangement with Qwest was a form of wide area calling service. The facilities arrangement was optional because Mountain had the choice of obtaining free delivery of all its paging traffic to its POC by permitting Qwest to modify its facilities configuration. And the facilities arrangement had a toll suppression function because it eliminates some intraLATA toll charges that Qwest otherwise would have assessed upon its own customers.

The Commission reasonably rejected Mountain's argument that these charges are identical to the facilities charges invalidated in TSR Wireless. The Commission in TSR Wireless construed section 51.703(b) to bar LECs from charging for the delivery of LEC-originated intraMTA, intraLATA traffic to the paging carrier's POC. Unlike TSR Wireless, this case does not involve Qwest's refusal to provide the delivery of intraMTA, intraLATA traffic that Qwest originates to Mountain's POC. Rather, the charges in question are for an optional service that is

[38] As with transiting traffic, the Commission found unpersuasive Mountain's claim that permitting Qwest to charge for the dedicated toll facilities would result in "double recovery." 17 FCC Rcd at 15139 (¶ 7) (J.A.). The Commission found that Qwest is unable to recover the costs of those facilities through reciprocal compensation charges and that Mountain provided no evidence that Qwest recovers its transport costs for those facilities from another source. 17 FCC Rcd at 15139 (¶ 7) (J.A.).

designed to reduce significantly the toll charges that Qwest otherwise would collect from its own end-users for calling Mountain's subscribers. Because these optional facilities qualify as a wide area calling arrangement under TSR Wireless, section 51.703(b) does not bar Qwest from charging Mountain for them.

2. The Commission reasonably upheld Qwest's charges for transiting traffic. The Commission in TSR Wireless and in subsequent decisions repeatedly has upheld the lawfulness of LECs' charges for the delivery of transiting traffic. The Commission reasonably followed precedent in adjudicating Mountain's complaint without considering alternative approaches. Indeed, the Commission's responsibility as an adjudicator is to decide a complaint under the law in effect at the time of the complaint. Qwest relied upon the policy established in TSR Wireless and its progeny in charging Mountain for the delivery of transiting traffic. It was reasonable for the Commission not to consider applying a new policy retroactively in this adjudication.

The Commission's policy on transiting charges is reasonable and consistent with cost-causation principles. Mountain offers – and charges its subscribers for – the ability to receive messages between a calling party's premises and Mountain's subscriber's pager. The transiting traffic is a necessary part of the service Mountain provides to its end-users. In contrast, transiting traffic is not part of any service that Qwest offers to its subscribers. The Commission's determination that Qwest lawfully charged Mountain for transiting traffic does not violate principles of cost causation.

The Court should not consider the intervenors' claim that Qwest's charges for transiting traffic violate section 51.709(b). Mountain did not raise a section 51.709(b) issue on review, and the intervenors may not present issues not raised by the petitioner. If the Court reaches the section 51.709(b) issue, it should reject the intervenors' claim. By its express language section

51.709(b) is limited to traffic between "two carriers' networks," and transiting traffic, by definition, is the transport of traffic among at least three carriers' networks. Moreover, the construction of section 51.709(b) advanced by the paging carriers is inconsistent with agency precedent.

3. The Court lacks jurisdiction to consider Mountain's claim that the Commission erred in not providing an explanation for its statement in footnote 13 of the Order that a terminating carrier may seek reimbursement for transiting costs from originating carriers through reciprocal compensation. Because Mountain did not raise any argument about footnote 13 in a petition for reconsideration before the agency, section 405 bars the Court from considering it. Mountain also has not shown how it is injured by footnote 13 and thus has no standing to challenge it. Furthermore, the Court's subject-matter jurisdiction to review agency orders does not extend to the review of non-decisional statements such as the one in footnote 13. If the Court considers the issue, it should reject Mountain's argument. While the Commission has a duty to justify its orders, it is under no obligation to provide an explanation for every statement set forth in its written decisions.

STANDARD OF REVIEW

To prevail on review, Mountain must show that the Order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. E.g., Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. E.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971).

The Court's review of an agency's interpretation of its own regulations is "particularly deferential." Davis, 202 F.3d at 365.[39] The Court must "give 'controlling weight' to the Commission's interpretation of its own regulation 'unless it is plainly erroneous or inconsistent with the regulation.'"[40] Deference to the expert agency's interpretation "is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (internal quotations omitted.).

ARGUMENT

I. THE COMMISSION REASONABLY HELD THAT QWEST HAD LAWFULLY CHARGED MOUNTAIN FOR FACILITIES USED IN A FORM OF WIDE AREA CALLING.

A. The Charges Challenged In This Case Are For Dedicated Toll Facilities That Are Part Of A Wide Area Calling Arrangement.

TSR Wireless established that section 51.703(b) does not prohibit LECs from charging paging carriers for facilities used in wide area calling "or similar services." 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). Wide area calling or equivalent services as described in TSR Wireless have two characteristics. First, they are optional services that are "not necessary for interconnection or for the provision of [a paging carrier's] service to its customers." 15 FCC Rcd at 11184 (¶ 30). Second, these services have a toll suppression function that, at the expense

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[39] See also Omnipoint Corp. v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996), quoting National Medical Enterprises v. Shalala, 43 F.3d 691, 697 (D.C. Cir. 1995).

[40] Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F.3d 155, 160 (D.C. Cir. 2001), quoting High Plains Wireless L.P. v. FCC, 276 F.3d 599, 607 (2002).

of the originating LEC, provides benefits to the paging carrier by enabling the paging carrier to "'buy down' the cost of . . . toll calls to make it appear to end users that they have made a local call rather than a toll call." 15 FCC Rcd at 11184 (¶ 30). By eliminating the toll charges, Mountain makes its paging service more attractive to its own subscribers, who may expect to receive more calls because they are free to the callers. As shown below, the arrangement by which Mountain acquires DID numbers from Qwest in Pueblo, Walsenburg and Colorado Springs and obtains dedicated toll facilities from Qwest connecting these DID numbers to its sole point of connection POC in Pueblo has both characteristics of a wide area calling or equivalent service. See Order, 17 FCC Rcd at 15137-39 (¶¶ 4-6) (J.A.).

It is conceded that this arrangement is not necessary for interconnection or for Mountain's provision of paging service.[41] The record shows that Qwest offers Mountain a variety of interconnection configurations for the termination of traffic to Mountain's customers.[42] Some of these options provide for the free delivery of intraLATA calls placed by Qwest's subscribers through any POC (or multiple POCs) that Mountain selects within the MTA.[43] For example, Qwest offers to deliver without charge all calls placed by its subscribers within the LATA through Mountain's Pueblo POC, so long as Mountain obtains and uses DID numbers for its subscribers from the closest central office to that POC.[44] Thus, if Mountain obtained Pueblo

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[41] See Staff Order, 17 FCC Rcd at 2079 (¶ 13) (J.A.).

[42] See, e.g., Qwest July 2000 Letter at 3 (J.A.); Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) (J.A.).

[43] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

[44] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

DID numbers and assigned them to all of its subscribers, calls to those subscribers would not generate charges to Mountain. As another option, if Mountain were to establish a separate POC in Walsenburg "for its paging subscribers that prefer a Walsenburg telephone number, and a third POC in Colorado Springs for its paging subscribers that prefer a Colorado Springs telephone number," "[e]ach of these POCs and the delivery of all local calls to these POCs by Qwest would be free."[45]

Mountain's arrangement with Qwest also satisfies the second criterion of a wide area calling service because it eliminates some intraLATA toll charges that Qwest otherwise could collect from its own customers who call Mountain's paging subscribers. This arrangement permits Mountain – with a single POC in Pueblo – to "obtain telephone numbers rated in each exchange [Colorado Springs, Pueblo and Walsenburg] so Qwest customers in one local calling area can avoid toll charges when calling a Mountain customer located in the same calling area." Petitioner's Brief at 10. This is so even though the calls in many cases would pass from one calling area to another (Pueblo) in order to reach the called paging customer through Mountain's single POC in Pueblo. Under many state regulatory policies, LECs ordinarily impose toll charges on calls that originate in one service area and terminate in another. Mountain's arrangement enables the paging carrier to "ensure[] that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to callers in those areas." Order, 17 FCC Rcd at 2097 (¶ 13) (J.A.).[46]

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[45] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 2 (¶ 4) (J.A.).

[46] See Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

Mountain claims that its arrangement with Qwest is not a form of wide area calling as defined by TSR Wireless. Mountain first contends that the arrangement here cannot be a wide area calling service because "there is no record evidence to support" the Commission's finding that this arrangement prevents Qwest from charging its customers "for what would ordinarily be toll calls to access Mountain's network." Petitioner's Brief at 38, quoting Order, 17 FCC Rcd at 15139 (¶ 5) (J.A.). Mountain's claim that the Commission's finding lacks evidentiary support is simply wrong. Substantial record evidence shows that Mountain's arrangement enables Qwest end-users outside of the Pueblo service area to avoid toll charges they otherwise would pay when they call Mountain subscribers physically located in the same local calling area.[47] By acquiring DID numbers in Colorado Springs and Walsenburg and dedicated toll facilities connecting those numbers to its POC in Pueblo, Mountain enables that Qwest customers in Colorado Springs and Walsenburg to avoid toll charges when calling Mountain subscribers located within the same exchange.

Contrary to Mountain's assertion, the fact that "Qwest is free to impose toll charges if a customer in one of its local calling areas (e.g., Colorado Springs) calls a Mountain customer in a different local calling area (e.g., Pueblo)" does not undercut the Commission's finding that its arrangement is a form of wide area calling. Petitioner's Brief at 38. Nothing in TSR Wireless states that a wide area calling or equivalent service must eliminate all toll charges. The Commission reasonably construed TSR Wireless to classify as a form of wide area calling an optional arrangement that "allows a paging carrier to subsidize the cost of calls from a LEC's

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[47] See, e.g., Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) (J.A.); "Qwest Corporation's Opposition to Mountain's Petition for Reconsideraiton of Memorandum Opinion and Order" (Mar. 18, 2002) at 6 (J.A.).

customers to the paging carrier's customers," even if the arrangement does not eliminate all toll fees. Order, 17 FCC Rcd at 15137 (¶ 5) (J.A.). See TSR Wireless, 15 FCC Rcd at 11184 (¶ 30).

Mountain asserts that calls to DID numbers associated with the Walsenburg or Colorado Springs central office are charged as local calls whenever they are placed by persons calling from Walsenburg or Colorado Springs. Although its argument is not clear, Mountain apparently contends that the Commission erred in finding that its arrangement is a wide area calling service that suppresses toll calling because calls that originate and terminate in the same local calling area should not be subject to toll charges. As noted above, however, Mountain's arrangement provides Mountain with DID numbers associated with the Walsenburg or Colorado Springs central office and the dedicated facilities used to transport messages to those numbers from Mountain's POC in Pueblo and this, in turn, enables Qwest end-users located in Walsenburg and Colorado Springs to avoid toll charges when calling Mountain subscribers. Although Mountain's arrangement with Qwest provides a different form of toll suppression from one that directly affects the rates of individual calls, that fact does not undercut the reasonableness of the Commission's determination that Mountain's arrangement is a form of wide area calling.

Equally unavailing is Mountain's claim that its arrangement cannot be a form of wide area calling because Mountain did not order the specific reverse billing arrangement denominated as "wide area calling" in Qwest's intrastate tariff.[48] The Commission in TSR Wireless stated explicitly that LECs, consistent with section 51.703(b), were entitled to charge

[48] "A 'reverse billing arrangement' is one in which the LEC assesses a per minute usage charge to the CMRS carrier, in place of a toll charge to the originator of the call." Order, 17 FCC Rcd at 15137 n.18 (J.A.).

paging carriers for "'wide area calling' or similar services." 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). The language of TSR Wireless itself establishes that the category of "'wide area calling' or similar services" for which LECs can charge paging carriers is broader than the specific reverse billing arrangement in Qwest's Colorado tariff. As the Commission explained, a "reverse billing arrangement is only one of several types of wide area calling services." Order, 17 FCC Rcd at 15138 (¶ 5) (J.A.).[49]

Finally, Mountain argues that the Order is arbitrary because it "remove[s] the ability of a CMRS carrier to maintain a single point of interconnection within a LATA." Petitioner's Brief at 39. According to Mountain, "a CMRS carrier will need a point of interconnection in each local calling area to avoid incurring facilities charges imposed upon it by a LEC." Id. In fact, the evidence of record shows that the Order has no effect on Mountain's ability, if it chooses, both to maintain its single POC in Pueblo and to obtain "free interconnection facilities for all calls placed by Qwest customers within the LATA."[50] In that case, an end user outside the Pueblo local services area would incur toll charges on calls delivered by Qwest to Mountain's POC in Pueblo, which is why the arrangement with Mountain includes a toll suppression feature.

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[49] Mountain also claims that its arrangement cannot reasonably be classified as a form of wide area calling service because Mountain uses a Type 1 rather than a Type 2 interconnection. E.g., Petitioner's Brief at 39. The Commission in TSR Wireless described wide area calling or similar services as optional services with a toll suppression function, not as services that conformed to specific technical characteristics. Nothing in TSR Wireless or any other Commission decision suggests that the category of "'wide area calling' or similar services" (15 FCC Rcd at 11166, 11184 (¶¶ 1, 30)) is limited to services that use a Type 2 interconnection or have other specific technical characteristics.

[50] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

As noted above, Mountain made a business decision to acquire a specific type of network configuration in which it obtains DID numbers in Colorado Springs, Walsenburg and Pueblo and obtains dedicated toll facilities connecting these DID numbers to its single POC in Pueblo. Although that particular configuration includes a form of wide area calling, Mountain retains the option of reconfiguring its network to eliminate the wide area calling feature and its associated charges. For example, "Mountain is free to cancel both the DID numbers [associated with the Colorado Springs and Walsenburg central offices] and the dedicated toll facilities connecting those DID numbers to Mountain's single point of connection." Order, 17 FCC Rcd at 15139 (¶ 6) (J.A.). Qwest then would supply Mountain with DID numbers from its central office in Pueblo and would deliver all calls originated by its end users in the LATA to Mountain's single POC at no charge.[51]

Mountain thus is wrong in suggesting that the charges in question are a result of its election to establish a single POC. Rather, the charges are attributable to Mountain's business decision to maintain a network arrangement – including the single POC, but also including DID numbers from three central offices and dedicated toll facilities connecting those offices with the single POC – that incorporates wide area calling.

B. The Commission Reasonably Found That Qwest's Charges to Mountain Were Not Traffic Or Facilities Charges Proscribed By Section 51.703(b) And TSR Wireless.

The Commission in TSR Wireless interpreted section 51.703(b) to prohibit a LEC from assessing charges for delivering intraLATA traffic originated on its network to the POC (or

[51] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

POCs) selected by the paging carrier. TSR Wireless, 15 FCC Rcd at 11176 (¶ 18). The Commission also construed section 51.703(b) to forbid a LEC from requiring paging carriers to pay for such delivery "by merely re-designating the 'traffic' charges as 'facilities' charges." 15 FCC Rcd at 11181 (¶ 25). Neither section 51.703(b) nor any other rule prohibits a LEC from assessing charges for optional wide area calling or similar services. 15 FCC Rcd at 1183-84 (¶¶ 30-31).

The Commission in this case reasonably concluded that the challenged charges were not delivery or facilities charges proscribed by section 51.703(b) and TSR Wireless. It is undisputed that Qwest offered Mountain – and continues to offer Mountain – the delivery of all intraMTA, intraLATA calls from Qwest end-users to Mountain's POC free of charge.[52] Where Mountain does not procure an optional wide area calling arrangement that reduces the toll charges Qwest assesses on its own customers, Qwest is required by the rule to transport for free every intraMTA, intraLATA call made by a Qwest end-user directly to Mountain's POC.

In contrast to TSR Wireless, this case does not involve Qwest's refusal to provide free delivery of intraLATA traffic that it originates to the paging carrier's POC in violation of section 51.703(b). Rather, this case involves Qwest's charges for dedicated toll facilities as part of an optional wide area calling arrangement that has the effect of suppressing certain toll charges that Qwest otherwise would collect from its own end-users. The Commission in TSR Wireless established that section 51.703(b) does not forbid LECs to charge for that type of arrangement. The Commission's interpretation of section 51.703(b) in this case is consistent with the relevant

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[52] See Qwest July 2000 Letter at 3 (J.A.); Qwest Corporation's Brief on the Disputed Material Issues at 11 & Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.). Under this option, Mountain would obtain from Qwest DID numbers associated with the central office closest to Mountain's POC.

administrative precedent, including TSR Wireless. Indeed, Qwest revised its billing and interconnection practices explicitly to comply with TSR Wireless.[53]

The paging companies argue that the technical features of Mountain's arrangement in this case are "identical in all material respects" to the arrangement in TSR Wireless, except for the length of the dedicated lines. Petitioner's Brief at 32. See Paging Carriers Intervenors' Brief at 13-14. Because the Commission held that some of Qwest's charges in TSR Wireless were unlawful facilities fees, the paging carriers argue that the Commission departed from administrative precedent in not concluding that Qwest's charges in this case also were proscribed facilities charges.

The Commission recognized that "the network configuration discussed in the TSR Wireless Order is similar to Mountain's arrangement with Qwest," but it explained in detail why the technical similarities were not decisionally significant. Order, 17 FCC Rcd at 15138 (¶ 6) (J.A.). TSR Wireless establishes that LECs cannot charge for facilities that are necessary for the delivery of Qwest-originated intraLATA traffic. The charges in this case, however, are for an optional arrangement that is "not necessary to effectuate interconnection." Order, 17 FCC Rcd at 15139 (¶ 6) (J.A.). Qwest gave Mountain the option of receiving free delivery of all intraLATA calls originated by its end-users, and required Mountain to pay only for an optional configuration that effectively reduced Qwest's own toll revenues and enhanced the value of Mountain's services to its subscribers. The Commission reasonably explained why it classified the charges in this case as permissible wide area calling fees rather than as unlawful facilities charges.

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[53] See Qwest July 2000 Letter (J.A.).

The paging carriers in large part fail to mention – let alone attempt to refute – the Commission's reasons for distinguishing Qwest's charges in this case from the facilities charges found unlawful in TSR Wireless. Although "an agency may not 'treat like cases differently,'"[54] it is not arbitrary for the Commission, as it did here, to consider the differences between the case before it and a prior ruling, and to explain the reasons for reaching different conclusions. See, e.g., Melcher v. FCC, 134 F.3d 1143, 1150 (D.C. Cir. 1998).

C. The Paging Carriers' Contention That The Commission Erred By Ignoring The Virginia Arbitration Order Is Not Properly Before the Court, And Is Without Merit In Any Event.

The paging carriers claim that the Order is inconsistent with the Virginia Arbitration Order, an almost contemporaneous interlocutory staff ruling that addresses the terms and conditions of interconnection agreements between Verizon Virginia and three competitive LECs.[55] Several parties filed applications for review of the Virginia Arbitration Order with the Commission, and one hotly contested issue in that pending administrative proceeding is whether the staff decision is consistent with the Order in this case.[56] The Commission has not yet ruled on the merits of this issue (or indeed more generally on whether the Virginia Arbitration Order reflects agency policy). Appellate counsel thus take no position on whether that staff decision

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[54] Freeman Engineering Associates v. FCC, 103 F.3d 169, 178 (D.C. Cir 1997), quoting Airmark Corp. v. FAA, 758 F.2d 685, 691 (D.C. Cir. 1985).

[55] Petition of WorldCom, 17 FCC Rcd 27039 (WCB, 2002), petitions for reconsideration and applications for review pending ("Virginia Arbitration Order").

[56] See, e.g., "Verizon's Application for Review of the Wireline Competition Bureau's October 8, 2002 Order Approving the Interconnection Agreements," CC Docket No. 00-249, Petition of Cox Virginia Telcom (filed August 16, 2002) at 15-19; "Opposition of Cox Virginia Telecom, Inc.," CC Docket No. 00-249, Petition of Cox Virginia Telcom (filed Sept. 10, 2002) at i-ii, 10-12.

was correct. The Court can and should resolve this case without addressing the merits of the paging carriers' claim that the Order is inconsistent with the Virginia Arbitration Order. The Court lacks jurisdiction to consider that argument, and, in any event, the Commission is not required to conform its decisions with a decision of its staff.

Section 405 of the Communications Act bars judicial review of issues of law or fact on which the Commission "has been afforded no opportunity to pass." 47 U.S.C. § 405.[57] By requiring a litigant to raise an argument before the Commission as a condition precedent to judicial review, section 405 provides the agency with "an opportunity to cure any defect" in its order. [58] Because Mountain did not argue in this case, in a petition for reconsideration or in any other pleading,[59] that the Commission had an obligation to issue a ruling that was consistent with the Virginia Arbitration Order, section 405 denies the Court jurisdiction to consider that argument on review.

Even if the issue were properly before the Court, the paging companies are wrong in claiming that the Commission had a legal obligation to adhere to the Virginia Arbitration Order or to justify a departure from its staff's ruling. "It is well established that 'the positions of an agency's staff do not preclude the agency from subsequently reaching its own conclusion.'" MacLeod v. ICC, 54 F.3d 888, 891 (D.C. Cir. 1995), quoting San Luis Obispo Mothers for Peace

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[57] See, e.g., United States Cellular Corp. v. FCC, 254 F.3d 78, 83 (D.C. Cir. 2001).

[58] Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 181 (D.C. Cir. 1997). See FTC Communications, Inc. v. FCC, 750 F.2d 226, 231 (D.C. Cir. 1984); Rogers Radio Communications Services v. FCC, 593 F.2d 1225, 1229 (D.C. Cir. 1978).

[59] While the Virginia Arbitration Order was decided after the pleadings had been filed in the administrative pleading below, Mountain could have brought the issue to the Commission's attention in a petition for reconsideration of the Order.

v. NRC, 789 F.2d 26, 34 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).[60] Staff rulings such as the Virginia Arbitration Order thus are "irrelevant to [the Court's] analysis of the Commission's fidelity to its own precedents." Id. See Community Care Foundation v. Thompson, 318 F.3d at 227. This Court has emphasized that the FCC does not depart from precedent merely because it does not adhere to the decisions of "a subordinate body of the Commission." Amor Family Broadcasting Group v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1991). Just as this Court is not bound by the decisions of the federal district courts, the Commission is not bound by the decisions of its staff.[61]

Application of this principle is even more compelling where, as here, the staff order itself remains subject to further agency review. The Commission not only has not endorsed the Virginia Arbitration Order, but it is currently considering whether to vacate, modify or affirm it. It would be anomalous for the Court to require the Commission to adhere to a staff ruling while the agency is considering whether to affirm or overturn it on direct review. Such a ruling would

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[60] See generally Community Care Foundation v. Thompson, 318 F.3d 219, 227 (D.C. Cir. 2003) ("[T]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level").

[61] See Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1320 (D.C. Cir. 1998), quoting San Luis Obispo Mothers For Peace v. NRC, 789 F.2d at 33 ("position of an agency's staff, taken before the agency itself decided the point, does not invalidate the agency's subsequent application and interpretation of its own regulation"). Cf. Wood v. Thompson, 246 F.3d 1026, 1034 (7th Cir. 2001) (agency not bound by decision of administrative law judge).

interject the Court prematurely into an ongoing administrative proceeding and have a disruptive effect on the ongoing administrative process.[62]

D. The Paging Carriers' Claim That The Commission Failed To Follow Required Procedures Is Not Properly Before The Court, And In Any Event It Lacks Merit.

Mountain and its supporting intervenors argue that the Order is procedurally defective because the Commission effectively repealed section 51.703(b) without employing the notice and comment procedures set forth in section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. Because that procedural argument was never raised before the Commission, section 405 bars the Court from considering it on review. See Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1169-71 (D.C.Cir.1994) (section 405 bars petitioner from arguing for the first time on review that the FCC violated APA notice and comment requirements); City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1163 (D.C.Cir.1987) (same).

In any event, the paging carriers are wrong in claiming that the Order effectuated a de facto repeal of section 51.703(b). The Commission in its Order adjudicated Mountain's complaint that Qwest had violated section 51.703(b). In the course of that adjudication, the Commission interpreted section 51.703(b) not to prohibit the challenged charges because they were assessed for an optional wide area calling service, rather than for the delivery of LEC-

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[62] The argument that the Commission should have considered the Virginia Arbitration Order "precedent" also is undercut by the sequence of the decisions. The Staff Order in this case was released on February 4, 2002, more than five months before the Virginia Arbitration Order was released on July 17, 2002. The Commission's Order in this case was released on July 25, 2002 – just five days after the staff released the Virginia Arbitration Order. There is no reason to assume that the Commission itself was even aware of the staff's Virginia Arbitration Order when it adopted and released its Order in this case. In these circumstances, the requirement of section 405 that the agency have the opportunity in the first instance to address an issue is particularly compelling.

originated intraLATA traffic. The Commission's ruling thus construed and applied section 51.703(b); it did not repeal that regulation. Section 51.703(b) remains fully in effect and continues to prohibit LECs from imposing charges on paging carriers for facilities necessary for the delivery of LEC-originated intraMTA, intraLATA traffic. Although the paging carriers may not agree with the way the Commission construed and applied section 51.703(b), their disagreement does not transform this section 208 adjudication into a procedurally defective rulemaking. See Everett v. United States, 158 U.S. F.3d 1364 (D.C. Cir. 1998).

II. THE COMMISSION REASONABLY UPHELD QWEST'S CHARGES FOR TRANSITING TRAFFIC.

A. The Commission's Decision Is Consistent With Administrative Precedent.

The Commission has made clear that "paging carriers themselves must pay . . . for 'transiting traffic.'" See Qwest Corp., 252 F.3d at 468. Before Mountain filed its complaint, the Commission in TSR Wireless explicitly had declared that its rules permit the LECs to charge paging carriers for the transport of transiting traffic. 15 FCC Rcd at 11177 n.70. In subsequent complaint orders, the Commission has reaffirmed that it is lawful for LECs to assess such charges on paging carriers. Metrocall Order, 16 FCC Rcd 18123; Metrocall Reconsideration, 17 FCC Rcd 4781; Texcom Order, 16 FCC Rcd at 21494 (¶ 4); Texcom Reconsideration, 17 FCC Rcd 6275. The Commission consistently has denied every complaint filed by a paging carrier challenging the lawfulness of LECs' charges for delivering transiting traffic.

The paging carriers do not deny that TSR Wireless and its progeny upheld LEC charges to paging carriers for transiting traffic. Mountain acknowledges that the Commission declared that "[c]omplainants [paging carriers] are required to pay for 'transiting traffic.'" Mountain Brief at 41, quoting TSR Wireless, 15 FCC Rcd at 11177 n.70. The paging carriers argue instead

that TSR Wireless and the Texcom orders -- the paging carriers ignore the Metrocall orders -- were wrongly decided. Mountain Brief at 41-42; Paging Carriers Intervenor Brief at 22. That argument is not properly before the Court and in any event lacks merit.

The Court lacks jurisdiction to entertain the paging carriers' collateral challenge to the Texcom orders and TSR Wireless. Mountain's petition for review invokes the Court's jurisdiction to review the Order, not prior Commission decisions that have been affirmed (TSR Wireless) or were not challenged in Court within the 60 day period prescribed by the Hobbs Act (Texcom). See 28 U.S.C. §§ 2342(a), 2344; 47 U.S.C. § 402(a). The paging carriers' claims that the Texcom orders and TSR Wireless are "unexplained," "without legal support," or "incompatible with cost causation principles" thus are not properly before the Court. See Mountain Brief at 42; Paging Carriers Intervenors' Brief at 22.

In any event, the paging carriers' challenge to the Commission's adherence to administrative precedent in adjudicating Mountain's complaint can only be characterized as frivolous. The Commission, in section 208 adjudications, "has an obligation to decide the complaint under the law currently applicable." AT&T Corp. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1992). See also American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir 1995). As Mountain acknowledges elsewhere, the Commission's duty as an adjudicator is "to apply existing rules and orders to the facts presented." Mountain Brief at 5. As shown above, the existing law – established by TSR Wireless and its progeny – permits LECs to charge paging carriers for the transport of transiting traffic.

Mountain and its supporting intervenors argue that it would be better for the Commission to bar LECs from charging paging carriers for transiting traffic and to permit the LECs to recover the costs of delivering that traffic from the originating carriers. Appellate counsel take no

position on whether the Commission should adopt that policy prospectively. The Commission is conducting a rulemaking to consider changes in its existing intercarrier compensation rules and policies, and the agency has not yet decided what changes, if any, it will implement.[63]

The merits of the policy proposal advanced by the paging carriers, however, are irrelevant to the Court's disposition of this case. As noted above, the Commission adhered to existing law in adjudicating the section 208 complaints. Even if the Commission in the Order had been persuaded that the paging carriers' approach was preferable, it would have been inappropriate for the Commission to apply that new policy retroactively in this adjudication. The Court distinguishes between cases in which the agency adopts "'a new policy for a new situation,"[64] and those that entail the "substitution of new law for old law that was reasonably clear."[65] In the latter situation, an agency may "'protect the settled expectations of those who had relied'" on the previous policy by giving the new policy "prospectively-only effect."[66] Indeed, as this Court has stated, "an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy."[67] Qwest in charging Mountain for the transport of transiting traffic relied upon the policy established in TSR Wireless and its progeny, and the Commission reasonably adhered to that policy in this adjudication.

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[63] Developing a Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM").

[64] Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993), quoting New England Telephone, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

[65] Verizon Telephone Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001), quoting Williams Natural Gas, 3 F.3d at 1554.

[66] Public Service Company of Colorado v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996), quoting Williams Natural Gas, 3 F.3d at 1554.

[67] New England Telephone Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987).